

## EXHIBIT “E”

1 IN THE UNITED STATES DISTRICT COURT

2 FOR THE DISTRICT OF HAWAII

3 \_\_\_\_\_ )  
4 WAYNE BERRY, )  
5 Plaintiff, ) CIVIL NO. 01-00446SPK-LEK  
6 vs. )  
7 FLEMING COMPANIES, INC., )  
8 aka FLEMING FOODS, INC., )  
9 aka FLEMING, DOE )  
10 INDIVIDUALS 1-50 and )  
11 DOE PARTNERSHIPS, )  
12 CORPORATIONS and OTHER )  
13 ENTITIES 1-20, )  
14 Defendants. )  
15 \_\_\_\_\_ )

16 PARTIAL TRANSCRIPT OF PROCEEDINGS

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18 The above-entitled matter came on for Jury  
19 Trial commencing at 10:25 a.m. on Monday, February 24,  
20 2003, Honolulu, Hawaii,

21

22 BEFORE: HONORABLE SAMUEL P. KING

23 United States District Judge

24 District of Hawaii

25

26 REPORTED BY: LISA J. GROULX, COURT REPORTER

27 Notary Public, State of Hawaii

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2 A P P E A R A N C E S

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6 FOR PLAINTIFF: TIMOTHY J. HOGAN, ESQ.

7 WESLEY W. ICHIDA, ESQ.

8 LYNCH ICHIDA THOMPSON KIM & HIROTA

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14 FOR DEFENDANTS: LEX R. SMITH, ESQ.

15 ANN TERANSKI, ESQ.

16 Kobayashi, Sugita & Goda

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24 ALSO PRESENT: Ralph Stussi

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## 1 I N D E X

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## 3 OPENING STATEMENTS: PAGE

4 by Mr. Hogan 9

5 by Mr. Smith 22

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## 7 PLAINTIFF'S WITNESSES:

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9 WAYNE BERRY

10 By Mr. Hogan 33

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## 13 EXHIBITS: MARKED RECEIVED

14

15 Plaintiff's Exhibit 136 35 37

16 Plaintiff's Exhibit 82 45

17 Plaintiff's Exhibit 78 51

18 Plaintiff's Exhibit 81 61

19 Plaintiff's Exhibit 69 67

20 Plaintiff's Exhibit 71 77

21 Plaintiff's Exhibit 89 82

22 Plaintiff's Exhibit 72 89

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24 Defendant's Exhibit 221 67

25 Defendant's Exhibit 223 77

1 right of his right to control derivative copies of his  
2 software.

3 The EULA that Mr. Berry presented to Fleming  
4 was a document that Fleming took in its hands and  
5 began using his software, as the evidence will show.  
6 That EULA prevented Fleming from using the software  
7 through what is known as application sharing or PC  
8 Anywhere where another company can dial into it and  
9 use software.

10 The evidence will show that, as we sit here  
11 today, a company on the mainland is using Mr. Berry's  
12 software through PC Anywhere.

13 The evidence will show, through the testimony  
14 of Mark Dillon, a former API employee hired by Fleming  
15 who had access to Mr. Berry's system when he was at  
16 API and had access to the copies that were given to  
17 Fleming that he created numerous changes to the  
18 freight data base system, the freight control system,  
19 a hundred changes.

20 Each of these changes, by the understanding,  
21 were to be made by Mr. Berry not be a Fleming employee  
22 without his authority.

23 There will also be evidence that there was  
24 another program, the Fleming PO.EXE, which there will  
25 be evidence of how it takes data from companies and